

The Use Tax is a privilege tax imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. See 86 Ill. Adm. Code 150.101. (This is a PLR.)

May 15, 2003

Dear Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (which can be found at <http://www.revenue.state.il.us/LegalInformation/regs/part1200/>), is in response to your letter of February 6, 2003. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to AAA and its wholly owned subsidiary, BBB for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither AAA and its wholly owned subsidiary, BBB nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter, you have stated and made inquiry as follows:

I write to request a private letter ruling for AAA and its wholly owned subsidiary BBB, collectively referred to as 'Taxpayers,' under 2 Ill. Admin. Code §1200.110. There is no audit or litigation pending relating to the subject matter of this request. The Department has not previously ruled on the same or similar issue for Taxpayers, any of their affiliates or predecessors. Neither Taxpayers nor any of their representatives have previously submitted to the Department a request for a ruling on the same or a similar issue and withdrawn it before the issuance of a letter ruling.

Taxpayers request the Department's ruling with respect to the Illinois Retailers' Occupation Tax ('ROT') and Illinois Use Tax ('UT') treatment of the acquisition and subsequent use of an aircraft under the proposed transaction involving AAA and two of its wholly owned subsidiaries, BBB and CCC.

Proposed Transaction

XYZ is engaged in the business of selling aircraft and is registered as an aircraft dealer for sales and use tax purposes in one or more jurisdictions. XYZ is not engaged in business in Illinois. XYZ currently holds, or soon will hold, title to a jet aircraft suitable for transporting corporate employees and business guests ('the Aircraft'). The aircraft will not enter Illinois until after XYZ has transferred ownership.

In April 2002, GGG and XYZ entered into an Aircraft Purchase Agreement ('Agreement') whereby GGG agreed to purchase the Aircraft from XYZ. AAA guaranteed payment and performance of all of GGG's obligations under the Agreement.

AAA has decided to liquidate GGG prior to GGG's acquisition of the Aircraft. As a result of the liquidation, AAA will succeed to GGG's rights and obligations under the Agreement. Thus, AAA will obtain exclusive rights to purchase the Aircraft from XYZ. It is anticipated that the transfer of title and physical delivery of the Aircraft from XYZ to AAA will occur outside Illinois. The Aircraft will be located and operated outside the state of Illinois at all times during which AAA holds title.¹

In an effort to limit AAA's exposure to potential liability attributable to the ownership and operation of the Aircraft, shortly after acquisition of the Aircraft, AAA will transfer the Aircraft to its wholly owned subsidiary, BBB, as a contribution to BBB's capital. BBB will not issue any additional stock or provide any other consideration to AAA in exchange for the Aircraft. Further, BBB will not assume any liabilities of AAA. Copies of the proposed transfer documents, which consist of the General Aircraft Assignment and FAA Bill of Sale, are attached. AAA's transfer of the Aircraft to BBB will qualify as a tax-free capital contribution under the Internal Revenue Code. The Aircraft will be located outside Illinois when title and possession of the Aircraft are transferred from AAA to BBB.

Upon completion of the transfer, BBB intends to bring the Aircraft to Illinois and hangar the Aircraft at an Illinois airport. BBB further intends to contract with an unrelated third party ('Aircraft Operator') who will provide services related to the operation and maintenance of the Aircraft. BBB will provide flight services for AAA and AAA's affiliates. BBB will invoice AAA and its respective affiliates for the costs associated with flight services performed on their behalf.

Ruling Requested

Taxpayers request a ruling confirming the following:

1. AAA's acquisition of the Aircraft from XYZ will not be subject to ROT;
2. AAA will not incur UT on the Aircraft acquired from XYZ;
3. The transfer of the Aircraft from AAA to BBB as a contribution to capital will not be subject to ROT; and
4. BBB's subsequent use and operation of the Aircraft in Illinois will not be subject to UT.

Law and Analysis

1. AAA's acquisition of the Aircraft from XYZ, outside the state of Illinois, will not be subject to the Illinois ROT.

The ROT is imposed upon an Illinois retailer's gross receipts derived from retail sales of tangible personal property. 35 ILCS 120/2-10. Only those retailers engaged in business in the state of Illinois are subject to the ROT. 35 ILCS 120/3. Although XYZ is a retailer of aircraft, XYZ is not engaged in business within the state of Illinois. Further, at no point in time while XYZ holds title will the Aircraft be located within Illinois. Thus,

XYZ cannot be deemed to be engaged in business in Illinois solely by virtue of its acquisition, ownership and/or sale of the Aircraft to AAA.

XYZ will not be subject to the Illinois ROT. As a result, AAA's acquisition of the Aircraft from XYZ will not be subject to the Illinois ROT.

2. AAA will not incur Illinois UT on the Aircraft acquired from XYZ.

The UT is a privilege tax imposed on the use in Illinois of any kind of tangible personal property purchased at retail regardless of where it was purchased. 35 ILCS 105/3; 86 Ill. Adm. Code Sec. 150.101(a). 'Use' is defined as the exercise of 'any right or power over tangible personal property incident to the ownership of that property.' 35 ILCS 105/2. Property must be used within the state before the UT applies. Unless the Aircraft is physically located or operated within the state of Illinois while AAA holds title, AAA cannot be said to have exercised a taxable use of the property within the state. Assuming the Aircraft remains outside the state of Illinois at all times while AAA holds title to it, AAA will not incur Illinois UT on the Aircraft acquired from XYZ.

3. The transfer of the Aircraft from AAA to BBB as a contribution to capital for consideration will not be subject to the Illinois Retailers' Occupation Tax.

The ROT is imposed upon an Illinois retailer's gross receipts derived from retail sales of tangible personal property. 35 ILCS 120/2-10. 'Retail sales' are defined by statute as transfers of property made to a 'purchaser' in exchange for 'a valuable **consideration**.' 35 ILCS 120/1 (emphasis added). A 'purchaser' is defined as anyone who acquires the ownership of or title to property for 'a valuable **consideration**.' 35 ILCS 120/1 (emphasis added). Further, the measure of the ROT is the 'gross receipts' from retail sales. That term is defined as the 'total selling price' or the 'amount of sale,' which, in turn, are both defined as the '**consideration** for a sale...' 35 ILCS 120/1 (emphasis added).

In light of the statutory framework, consideration must be given in exchange for property before a particular transaction will be subject to ROT. IL PLR ST 02-0001-GIL (Jan. 2, 2002). However, consideration, is not limited solely to cash, but is also defined to include property and services. 35 ILCS 120/1. Thus, a retail sale will occur whenever a retailer transfers property in exchange for cash, property, services, or any combination thereof.

The Department has recently issued guidance with respect to the application of these statutory principles to corporate transactions, including reorganizations, incorporations, and capital contributions. As articulated by the Department, in those transactions where a contribution of property is made without the transfer of any consideration, no retail sale has occurred and thus the ROT does not apply to the transfer. IL PLR ST 02-0001-GIL (Jan. 2, 2002). Conversely, in those transactions where an exchange of capital assets is supported by consideration such as cash, services or property, including stock of the entity receiving the capital assets, a sale at retail has occurred and the ROT will apply. IL PLR ST 99-0001-PLR (Jan. 6, 1999).

Pursuant to these general principles, a capital contribution by a parent to a wholly owned subsidiary where no consideration is tendered or received in exchange for the contribution is not a retail sale and thus the ROT does not apply. BBB is a wholly owned subsidiary of AAA and was formed prior to 1987. As evidenced by the

supporting documentation, AAA will receive no cash, services, stock or other property from BBB in exchange for its contribution of the Aircraft to BBB. BBB will not assume any liabilities of AAA. AAA will thus receive no consideration from BBB in exchange for the Aircraft. As a result, the transfer is not a retail sale and is not subject to the ROT.

4. BBB's subsequent use and operation of the Aircraft in Illinois will not be subject to Illinois Use Tax.

The UT is a privilege tax imposed upon the in-state use of any kind of tangible personal property purchased at retail regardless of where it was purchased. 35 ILCS 105/3; 86 Ill. Adm. Code Sec. 150.101(a). The UT complements the ROT and thus is restricted to cases in which the property is acquired pursuant to a retail sale. 86 Ill. Adm. Code Sec. 150.125. As a result, Illinois UT does not apply to property acquired in a transaction that would not generally be subject to the ROT. 35 ILCS 105/3-65.

As discussed above, the transfer between AAA and BBB is not a 'retail sale' and will not be subject to the Illinois ROT. Because BBB will have acquired the Aircraft in transaction that will not be subject to the Illinois ROT, its subsequent use of the Aircraft in Illinois is not subject to the Illinois UT.

If you are unable to issue a ruling consistent with the conclusions set forth above, please contact the undersigned to discuss this matter prior to issuing such a ruling. Thank you in advance for your assistance regarding this matter.

DEPARTMENT'S RESPONSE:

Please note that the Department cannot provide you with a determination regarding the tax liability of the corporation described in your letter as "XYZ" since this corporation is not a party to this letter ruling.²

Based upon the information contained in your letter and the documents attached to that letter, we believe that the AAA will not incur an Illinois Use Tax liability on the purchase of the aircraft. This determination is based upon the assertions that the sale of the aircraft, including physical delivery of the aircraft, will occur outside of the State of Illinois, and the aircraft will not be brought into this State at any time that AAA owns that aircraft.

The transfer of the aircraft from AAA to BBB as a contribution to the capital of BBB would not be subject to Retailers' Occupation Tax and Use Tax liability. This determination is based upon the assertions in your letter that BBB would provide no consideration of any type in exchange for the transfer of the aircraft. We believe that the aircraft, as a contribution to capital with no consideration of any type (cash, credit, service, or anything of value whatsoever etc.) being provided in exchange for the aircraft, is analogous to a gift situation. Your letter states that the "gift" or contribution of the aircraft to BBB occurs completely outside of this State. Therefore, AAA's use of the aircraft occurs completely outside of this State and no Illinois Use Tax would be incurred on the contribution of the aircraft. As the recipient of the aircraft, BBB, did not make a retail purchase of the aircraft and it would incur no Illinois Use Tax liability if the aircraft is brought into this State.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the

material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

I hope this information is helpful. If you have questions regarding this Private Letter Ruling you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Terry D. Charlton
Associate Counsel

TDC:msk

¹ Pursuant to a telephone conversation, you stated that the aircraft will not be registered in Illinois by AAA.

² No power of attorney has been provided evidencing that the individual or firm seeking this Private Letter Ruling is authorized to seek such a ruling on behalf of "XYZ."